FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 20 1903
JAMES H. McKENNEY,
Clerk.

No. 261.

DANFORTH GEER, ET AL.,

Plaintiffs in Error,

against

THE MATHIESON ALKALI WORKS,
CASTNER ELECTROLYTIC ALKALI COMPANY,

Defendants in Error,

EDWARD E. ARNOLD, RICHARD T. WILSON,
AND OTHERS,

Defendants.

Brief on behalf of The Mathieson Alkali Works,

Defendant in Error.

ALFRED ELY,
Of Counsel.

AGAR, ELY & FULTON,
Attorneys for Defendant,
MATHIESON ALKALI WORKS,
No. 31 NASSAU STREET,
New York City.

United States Supreme Court.

DANFORTH GEER, Willard F. Gay, Arthur W. Smith, Thomas T. Mathieson, Robert Morris, Annie Morris, W. E. S. Clarke, and James D. Thorburn,
Plaintiffs in Error,

against

THE MATHIESON ALKALI WORKS, a Corporation of the State of Virginia; The Castner Electrolytic Alkali Company, also a Corporation of the State of Virginia,
Defendants in Error,

and against

EDWARD E. ARNOLD, Richard T. Wilson, John G. Agar, Alfred Ely, John Russell Gladding, Frederick C. Sayles, Frank A. Sayles, Theodore Hooper, as Directors of the said Mathieson Alkali Works,
Defendants.

Brief for Respondent, The Mathieson Alkali Works.

BRIEF ON BEHALF OF DEFENDANT, THE MATHIESON ALKALI WORKS.

Preliminary Statement of the Case.

This is a question of jurisdiction upon writ of error to the United States Circuit Court for the Southern District of New York,

NOTE.—Citations in this brief are to the printed pages of the record.

First, upon its denial of a motion by the plaintiffs to remand the suit to the New York Supreme Court, and

Second, upon its determination then that it had no jurisdiction of the defendant the Mathieson Alkali Works, by reason of which said Circuit Court set aside the summons and the pretended service thereof upon said Mathieson Company as null and void and of no effect, and dismissed the bill of complaint as to the Mathieson Company "for lack of jurisdiction of the person of such "defendant" (p. 46, fol. 92).

Upon the motion to remand the Circuit Court held that:

"Whatever relief the complainants may be entitled "to against the directors upon the facts alleged, they "would as to the two corporations be entitled to a de- "cree for retransfer of the property and an accounting "for damages sustained by the transfer. This is a con- "troversy separable from the one between complainants "and the officers and directors who effected the transfer, "and citizenship of the parties to that separable contro- "versy being such as the statute contemplates, the motion "to remand is denied" (p. 20–21, fol. 39).

Upon the motion to set aside the summons the Circuit Court found as a fact that the Mathieson Company at the time (August 1, 1901) of the pretended service of the summons upon it, was not doing business and had no place of business within the State of New York. It also had no property and no agent within said State, and the summons was set aside upon the same grounds and decisions of this Court, which were considered authoritative by the same Circuit Court in an action against the same defendant by one Conley, decided by it about the same time, and recently considered by this Court upon appeal (No. 238, October Term, 1902. Argued April 15, 1903).

As the question of jurisdiction involved upon setting aside the summons against the Mathieson Company in

this suit is upon facts similar to those found by the Referee in the case of Conley, for the purposes of this appeal, the chief question for review is, therefore, upon the denial by the Circuit Court of plaintiffs' motion to remand, on the ground that the controversy was not a separable one as between the two corporations defendants on the one side, and the individual defendants as directors of the Mathieson Company on the other.

Statement of Facts.

This is an action for a personal judgment against the Mathieson Company, directing the re-conveyance of certain property at Niagara Falls, New York, conveyed on December 31, 1900, to the Castner Company by the Mathieson Company. By this conveyance the Mathieson Company transferred all of its property of every kind and description, "all the buildings, apparatus, plant, stock in "trade, trade marks and property of every kind and de-"scription of said The Mathieson Alkali Works at Niagara "Falls, in the State of New York; together with the good "will of the business heretofore conducted by it at said "Niagara Falls" to the Castner Company, "as a going "concern free of all encumbrances except as to the con-"tinuing rents, royalties or charges under any existing "leases or agreements" pp. 10–11, fol. 20).

This conveyance was executed by the Mathieson Company at Providence, Rhode Island, as will be seen from the acknowledgment (p. 11, fol. 22), and was duly recorded by the Castner Company in Niagara County. Since that time the Mathieson Company "has had no property or "office and has not done business within the State of New "York" (p. 34, fol. 65).

On August 1st, 1901 (when the alleged service of summons in this action was made on the Mathieson Company), and for more than six months prior thereto, the said

Mathieson Company "had no place of business within the "State of New York, no property within the State of New "York, no office within the State of New York, and no "agent resident in the State of New York. The main "office and place of business of said defendant corpora- "tion is and always has been at Saltville, Virginia" (p. 23, fol. 45). Affidavits of Edward E. Arnold, President, and also of Mr. Ely, a Director, upon whom the pretended service of summons was made.

Upon the petition of both the Mathieson Company and the Castner Company (pp. 18–20) this suit was duly removed to the United States Circuit Court for the Southern District of New York upon the ground

"That in this action the only controversy affecting your "petitioners, or in which your petitioners are actually in- "terested, is between the plaintiff on one side and your "petitioners, the Mathieson Alkali Works and the "Castner Electrolytic Alkali Company on the other, and "that said controversy is wholly between citizens of "different States and can be fully determined as between "them and is separable from the controversy which the "plaintiffs have or pretend to have as against the other "defendants" (p. 19, VI.).

A motion (page 1, fol. 1), first, was then made by the complainants to remand, on the ground that it was not a separable controversy, which was denied by the Court (p. 21, fol. 41), with an opinion by Judge Lacombe, already quoted (*ante*, p. 2), and the complainants' appeal (pp. 46–47) from this decision and the order of the Circuit Court (pp. 46–47) presents one of the questions for review in this Court.

A motion, second, was then duly made by the Mathieson Company (pp. 22–25) to set aside the summons and its alleged service upon it, by delivery, August 1st, 1901, to Alfred Ely, one of its directors, similar in all respects to the motion to the same effect in the previous case of Conley *vs.* Mathieson Alkali Works above referred to.

This motion was granted by the Circuit Court, the summons in this action and its alleged service on the defendant Mathieson Alkali Works was set aside, and as to said defendant the bill of complaint was dismissed for lack of jurisdiction (p. 46, fol. 92).

From this final decree complainants have also taken their appeal to this Court (pp. 96–97, fols. 93–94), assigning as errors that the Court below erred.

(I.)—In holding that these was a separable controversy between the complainants and the defendants Mathieson & Castner Companies.

(II.)—In refusing to remand.

(III.)—In setting aside the summons as against the Mathieson Company.

(IV.)—In holding that the defendant Mathieson Alkali Works, being a foreign corporation, and not having any office or place of transacting business in the State of New York, and not doing business in the State of New York, "and transacting no business therein" (see the language of the order of the lower court, p. 46, fol. 92), service of the summons and complaint upon a resident director could not confer jurisdiction of the Court over said defendant.

As to the facts in this suit upon which the Circuit Court dismissed the summons there is no dispute, this case differing in that respect from the case of Conley *vs.* Mathieson Alkali Works, recently argued in this Court. For this reason any discussion of the facts is unnecessary upon this appeal.

The statements of the Mathieson Company are admitted by the plaintiffs to be true, as quoted above, that

"On August 1st, 1901 (when the summons herein was served on the Mathieson Company), "and for more than "six months prior thereto, it had no place of business "within the State of New York, no property within the "State of New York, no office within the State of New "York, nor any agent resident in the State of New York"

(p. 23, fol. 45, affidavit of Mr. Ely, the person served). "Since then" (January, 1901), "the defendant" (Mathieson Company) "has had no property or office, and has "not done business within the State of New York" (p. 31, fol. 66, affidavit of Mr. Arnold, President of the Company).

If, therefore, the motion to remand was properly denied, the case of Goldey *vs.* Morning News, 156 U. S., should control, and the decisions of the Circuit Court should be affirmed.

Argument.

Upon this appeal two questions are before the Court for review.

I.—Does the bill of complaint present a separable controversy as between the plaintiffs and the Castner and Mathieson Companies on the one hand, and the plaintiff and the individual directors of the Mathieson Company on the other. If this is answered in the affirmative, and the decision of the Circuit Court is sustained;

II.—Whether the Mathieson Company having no office or place of business, no property, no agent and not doing business within the State of New York, in August, 1901, or for more than six months prior thereto, service of the summons on Mr. Ely, a director resident in New York, and having no part in the mangement or affairs of the corporation, conferred any jurisdiction upon the Court over said corporation to render a personal judgment against said corporation.

First.

This second proposition has been so fully argued within a few days, before this Court, in a similar case against this same defendant (Conley *vs.* Mathieson Alkali Works,

No. 238, October Term, 1902, which does not differ from this case, except that the facts as to the relation of the Mathieson Company to the State of New York in July and August, 1901, when service in this case was made, are admitted, while in the Conley case the facts as to its relation to New York in April, 1901, when service in that case was made, were disputed), that further discussion seems unnecessary beyond recalling to the Court the argument of counsel for the Mathieson Company in the Conley case, and urging again upon this Court, that the rule in

Goldey vs. *Morning News*, 156 U. S., 518.
Wabash Western R.R. Company vs. *Brow*, 164 U. S., 271.
Barrow Steamship Co. vs. *Kane*, 170 U. S., 100,

applies also here in favor of the Mathieson Company and requires the affirmance of the order and decree of the Circuit Court in this case as also in the Conley case.

This is not substantially a suit *in rem* as indicated by plaintiff's counsel, but a personal suit against the defendant corporations to compel them to do a certain act. That this act is with reference to the title of a certain *res* by no means makes it an action *in rem*.

Nor does the claim of plaintiffs that the Mathieson Company *ought* to have title to and own the plant at Niagara make the Mathieson Company the owner for any purpose affecting the jurisdiction. Nor is the allusion of plaintiffs' counsel to Saltville as "a Virginia hamlet or jungle" anything more than a vain imagining on his part to obscure the fact that the Mathieson Company has property and plant in Saltville involving an investment of over $4,000,000 in hard cash and over fifteen thousand acres of land.

SECOND.

Upon this appeal the chief point for review is, therefore, the question arising upon the denial by the Circuit

Court of the plaintiffs' motion to remand on the ground that the controversy as against the defendant corporations is not separable from any controversy which the plaintiffs' claim to have against the other defendants. No other defendant except the Mathieson and Castner companies is a citizen of Virginia, and none of the plaintiffs is a citizen of Virginia.

Upon this point the only question is, whether the controversy alleged in the complaint against the two defendant corporations is separable from any controversy there may be against the individual defendants, who are sued only as directors of the Mathieson Alkali Works.

I.—The bill of complaint (pp. 3–14) is full of immaterial and irrelevant matter without place and improper in such pleading. Stripped of all such matter, the plaintiffs' complaint is as follows;

The plaintiffs were, on December 31, 1900, stockholders of the defendant Mathieson Alkali Works (p. 3, Paragraph II.), which was organized in 1892 for the purpose of manufacturing soda ash and chemicals (par. III.) and then proceeded to erect works for its business at Saltville, Virginia, which it "completed, put in operation and has since maintained" (p. 4, par. VII.).

In 1896 it made a contract with the Niagara Falls Power Company, at Niagara Falls, New York, and subsequently built a plant there (par. VIII.) for manufacturing caustic soda electrolytically under various patents (p. 9, fol. 18), and subsequently carried on one part of its business at Saltville, Virginia (par. VII.), and another part at Niagara Falls, New York (p. 4., par. VIII.).

On December 31, 1900, the defendant Mathieson Alkali Works sold and transferred all its plant at Niagara Falls, with the patents which it used there, to the defendant Castner Company (p. 8, par. XIV.). And plaintiffs allege that this conveyance was the result of a conspiracy

by the Directors of the Mathieson Alkali Works (p. 8 and 13), and was fraudulent and void (p. 13, par. XVI.), and for this reason "bring this action to set aside the aforesaid conveyance" (p. 13, par. XVI.), and for an accounting "by the individual defendants, directors of the said Mathieson Alkali Works, as agents and trustees of said Company, for their acts and doings in the premises" (p. 15, fol. 28).

This summarizes the complaint and is all there is of it, and states the controversies alleged and the relief sought by the plaintiffs therefor. It sets forth two distinct controversies or causes of action, one against the Mathieson Alkali Works and the Castner Company, to set aside the conveyance and for the re-conveyance of the property at Niagara Falls, and the other for an accounting by the various other defendants, as Directors of the Mathieson Company, "for their acts and doings in the premises."

So far as it alleges or prays relief against the Castner and Mathieson Companies, the action is to compel a reconveyance of the property by the Castner Company to the Mathieson Company, and incidently for an accounting by the Castner Company of "all its acts and doings in the premises."

So far as it alleges or prays relief against the individual defendants, it is merely an action for an accounting by them individually as directors.

It will thus be seen that the controversy against the defendant corporations is distinct and separable from that against the individual defendants, and that the presence of the individual directors is wholly unnecessary for any recovery or decree prayed for against the two corporations.

II.—In an action to set aside the conveyance to the Castner Company and for a reconveyance to the Mathieson Company, it cannot be seriously contended for a moment

that any other parties are necessary except the two companies, who alone are interested. Any decree made against these two would be final and conclusive, a complete determination of the entire controversy, and binding upon all officers, directors and agents of both companies, whoever they might be, whether parties to the action or not.

But the rule is well established that only *necessary* parties are to be regarded by the Court and that the residence of president and directors, co-defendants, does not bar the corporation's right of removal. (*Mayer* vs. *N. J. Steamboat Co.*, 24 Fed. R., 818.)

An injunction or decree against a corporation, its officers, directors and agents, as a class, is as effective and binding as if they were each named individually.

It is quite evident, therefore, that the presence of the co defendants, who are merely sued *as directors*, is wholly unnecessary for the determination of any controversy respecting the conveyance of the Niagara Falls plant by the Mathieson Company and its re-conveyance by the Castner Company, and that it is a separable controversy.

III.—Upon a consideration of the prayer for relief, it will be observed further, by the Court, that the relief prayed for as against the defendants Castner and Mathieson Companies is separate and distinct from that prayed for against the other defendants and can be granted or denied fully without the presence of any of the other defendants.

As against the Mathieson Company, the relief prayed for is:

(1) That the conveyance by the Mathieson Alkali Works to the Castner Electrolytic Alkali Company referred to in the complaint may be adjudged fraudulent, and may be vacated and set aside;

(2) That a receiver of said Alkali Works may be appointed;

(3) That the said corporation may make a disclosure, and to that end, plaintiffs may have access to the books.

As against the Castner Company, the relief prayed for is:

That the defendant Castner Electrolytic Alkali Company may be required to account in respect to all its acts and doings in the premises hereinbefore set forth, and to make good and pay over all damages * * * * * and be required to reconvey the above-described property and patents so wrongfully conveyed to it by said Mathieson Alkali Works as aforesaid.

Counsel for the defendant Companies submits that in the relief prayed for there is not the faintest shadow of any controversy against those Companies which for a moment occasions or involves the presence, as co-defendants, of the Directors of either Company, and the fact *that the Directors of the Castner Company* are *not made parties* to the suit is conclusive in the matter.

Stripped of unnecessary phraseology, so far as the two defendant Virginia corporations are concerned, the relief prayed for by the plaintiffs against them both may be briefly stated as follows:

That the Castner Company be decreed to re-convey to the Mathieson Company the property at Niagara Falls referred to in the complaint, and to account to the Mathieson Company for the operations of said property during the meantime.

So far as these two corporations are concerned, this is the entire controversy, and the utmost relief which the plaintiffs pray for, or could wish.

For convenience the prayer for relief is annexed to this brief as an exhibit, printed verbatim, but slightly rearranged, so that all the relief asked against each defendant is assembled in one paragraph.

IV.—The bill of complaint presents a separable controversy by the complainants against the Mathieson Alkali Works and the Castner Electrolytic Alkali Company, for a reconveyance, separate from the controversy by the plaintiffs against the individual defendants as directors, for an accounting of their individual "acts and doings." The decision of the Circuit Court denying the plaintiff's motion to remand should be affirmed. *Barney* vs. *Latham*, 103 U. S., 205.

The various cases cited by counsel for the plaintiffs in error are not applicable to the present case, for the reason that there is obviously in each of them but a single controversy involved.

In *Hyde* vs. *Ruble*, 104 U. S., 407, the suit was upon an alleged contract of bailment made by the defendants as partners. Of course there was no separable controversy.

In *Fraser* vs. *Jennison*, 106 U. S., 191, the action was founded upon a paper writing purporting to be a last will and testament, and the defendants were all contestants.

In *Ayres* vs. *Wiswall*, 112 U. S., 187, the action was to foreclose a mortgage, and the defendants were mortgage debtors.

The foregoing is equally true of the other cases cited by plaintiffs.

THIRD.

The decision, order and decree of the Circuit Court denying the plaintiff's motion to remand and setting aside the service of the summons on the defendant Mathieson Alkali Works should be affirmed.

April, 1903.

ALFRED ELY,
Of Counsel for Defendant
Mathieson Alkali Works.

Exhibit A.

PRAYER FOR RELIEF *verbatim* as in the Complaint, but re-arranged according to the relief asked severally against the various defendants.

"The plaintiffs pray";

As to The Mathieson Alkali Works.

"That the conveyance in the name of the said Mathieson Alkali Works above mentioned, may be adjudged to be fraudulent and void, as to the stockholders of the said company, and that the same may be annulled, vacated and set aside;"

"That a receiver of the said Alkali Works may be appointed;"

"That the plaintiffs may have, and the said corporation be adjudged and required to make a full disclosure in respect to all the premises herein set forth and alleged; and that to the end of such disclosure the plaintiffs may have access to and inspection of all the books, records and papers of the said corporation, including stock book;"

As to the Castner Electrolytic Alkali Company.

"That the defendant, The Castner Electrolytic Alkali Company, may be required to account in respect to all its acts and doings in the premises hereinbefore set forth, and to make good and pay over all damages sustained by the plaintiffs and by the said Mathieson Alkali Works by reason of such acts and doings,"

"and that the said Castner Electrolytic Company may be adjudged, and required to reconvey the above described property and patents so wrongfully conveyed to it in the name of the said Mathieson Alkali Works as aforesaid;"

"And that the said Castner Electrolytic Company may be adjudged and required to account for and pay over all the income, earnings and revenue of the said property since the date of such conveyance;"

As to the several individual defendants.

"That the defendants, directors of the said corporation, may be enjoined from making any further disposition of the property of the company;"

"That the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said compaay for all their acts and doings in the premises above set forth;"

"And that they may severally and respectively be adjudged and required to make good and pay to the said Mathieson Alkali Works, and to the plaintiffs, all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth;"

"And that the plaintiffs may have such other and further relief as may be just and equitable, together with the costs of this action."